ORIGINAL

IN THE ILLINOIS COMMERCE COMMISSION
527 E. Capitol Avenue
Springfield, IL 62701

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Illinois Commerce Commission
RAIL SAFETY SECTION

UNITED TRANSPORTATION UNION - ILLINOIS LEGISLATIVE BOARD	)	
against	)	Case T04-0082
CANADIAN PACIFIC RAILWAY	)	File

RESPONSE TO MOTION TO DISMISS

NOW COMES the Petitioner, UNITED TRANSPORTATION UNION - ILLINOIS LEGISLATIVE BOARD ("UTU"), by and through its attorneys, HISKES, DILLNER, O'DONNELL, MAROVICH & LAPP, LTD., and for its Response to Respondent, CANADIAN PACIFIC RAILWAY's ("CP") Motion to Dismiss states as follows:

I.

CP's MOTION TO DISMISS

CP has filed a Motion to Dismiss asserting that the Formal Complaint of the UTU should be dismissed based upon three (3) grounds. First, CP asserts that the claim is pre-empted under the Interstate Commerce Commission Termination Act. Second, CP asserts that the claim is pre-empted by the Railway Labor Act. Finally, CP asserts that the claim is moot based upon an affidavit attached to CP's Motion to Dismiss sworn to by the Manager of Facilities for CP. UTU asserts that none of the three (3) grounds put forward by CP is a basis upon which the Illinois Commerce Commission should dismiss the UTU's claim.

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II.

STANDARDS UTILIZED IN DECIDING A MOTION TO DISMISS

A trial court should grant a motion to dismiss a complaint under section 2-615 of the Code only when the allegations in the complaint, construed in the light most favorable to the plaintiff, fail to state a cause of action upon which relief can be granted. Oliveira v. Amoco Oil Co., 201 Ill. 2d 134, 147 (2002). The court must accept as true all well-pleaded facts and inferences drawn from those facts. Oliveira, 201 Ill. 2d at 147. The complaint is to be construed liberally and should be dismissed only when it appears that the plaintiff could not recover under any set of facts. Dubinsky v. United Airlines Master Executive Council, 303 Ill. App. 3d 317, 323 (1999).

A motion to dismiss pursuant to Section 2-619 of the Code admits the legal sufficiency of the complaint, but asserts affirmative matter to avoid or defeat the claim. Rajean v. Donald Garney & Associates, Ltd., 347 Ill. App. 3d 403, 407 (2004). Although courts may consider affidavits under a section 2-619 motion to dismiss, courts may not consider affidavits under a section 2-615 motion to dismiss for failure to state a cause of action, which admits all well-pleaded facts and attacks facially only the complaint's legal sufficiency. Curtis v. County of Cook, 109 Ill. App. 3d 400, 409 (1982).

III.

FACTUAL ALLEGATIONS OF THE UTU'S FORMAL COMPLAINT

The Verified Formal Complaint filed by the UTU contains the following factual statements:

1. This Complaint pertains to the West Yard at CP's rail switching yard at Bensenville, Illinois.

2. Up until approximately seven (7) years ago, CP provided a shelter building for engineers and switchmen in the West Yard. This shelter was a full service building which included: locker room, restroom, shower, lunchroom and office equipment.

3. Approximately seven (7) years ago, the CP demolished the full service building and

brought a trailer into the West Yard to serve as a shelter facility. The trailer served as a shelter and contained male and female restrooms and a lunchroom/break room for the engineers and switchmen.

4. When the full service building was demolished, the CP required all the engineers and switchmen to utilize the locker room and showers at the General Yard Office. The General Yard Office is not located in the West Yard where the work is performed and is more than one (1) mile by rail, approximately 1.5 miles by internal roadway or two (2) miles by municipal roadway from the West Yard.

5. On or about March 9, 2004, the UTU lodged an informal complaint with the Illinois Commerce Commission ("ICC") due to the conditions, among other things, of the shelter in the West Yard.

6. On or about April 19, 2004, the ICC conducted an inspection of the West Yard facility, as well as three (3) other facilities at CP's Bensenville location. A written inspection report was prepared by the ICC and sent to CP. The ICC inspection report noted several violations which existed at the West Yard shelter.

7. On or about June 9, 2004, the ICC sent a follow-up letter to its inspection report of April 19, 2004, requesting information from the CP as to steps it was or had taken to remedy the violations noted previously.

8. On or about August 2, 2004, apparently in response to the ICC's inspection and request for remedial action, CP removed the trailer from the West Yard which had at least afforded the engineers and switchmen working in the West Yard with a shelter containing a restroom and lunch room/break area for their safety, comfort and convenience.

9. Since August 2, 2004, the engineers and switchmen who work in the West Yard have been without a shelter facility of any kind in the West Yard.

10. That at the West Yard of the CP Bensenville rail yard, the following violations of ICC regulations exist:

1. That in violation of 1545.110(c)(1), the CP has failed to provide engineers and switchmen who work in the West yard with adequate toilet facilities (male and female) which are conveniently located for the employees' use.

2. That in violation of 1545.120, the CP has failed to provide engineers and switchmen who work in the West Yard with adequate washing facilities which are conveniently located for the employees' use.

11. That pursuant to 1545.200, where shelter is requested by employees, shelter shall be provided by the railroad if that shelter is deemed necessary by the ICC.

12. That by this Complaint, if the CP desires to argue that it has not been already, the UTU, on behalf of its CP employees, requests that a shelter facility be provided for the West Yard employees. That further, said shelter facility should, at a minimum, contain adequate restrooms, a lunch room/break area and sufficient lockers for use by engineers and switchmen working in the West Yard.

IV.

JURISDICTION UNDER THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT VS. THE FEDERAL RAILROAD SAFETY ACT OF 1970

CP asserts that the UTU claim should be dismissed because according to CP, the claim is pre-empted by the Interstate Commerce Commission Termination Act ("ICCTA"). As demonstrated below, CP's argument is misplaced due to the fact that the ICCTA and the Surface Transportation Board ("STB") created thereby only pertain to economic regulations.

A.

LEGISLATIVE BACKGROUND OF ICCTA

In 1995, Congress adopted the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101, *et seq.*, primarily to reduce the economic regulation of railroads. The ICCTA eliminated the Interstate Commerce Commission ("ICC") and created the Surface Transportation Board ("STB") as an independent agency within Department of Transportation. The STB was given authority over many of the functions previously performed by the ICC. The ICCTA sets forth the scope of the STB's jurisdiction over

rail transportation and track construction, acquisition, operation, abandonment or discontinuance, which jurisdiction is exclusive. It extends to the STB "all regulatory power over the economic affairs and the non-safety operating practices of railroads." (underlining added). *Petition of Paducah & Louisville Ry., Inc.*, No. FRA-1999-6138, at 6-7 (Jan. 13, 2000). *See also*, S. Rep. No. 104-176 at 5-6 (1995), 1995 WL 701522. It provides:

(b) The jurisdiction of this Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange and other operating rules), practices, routes, services and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. §10501(b).

In 1966, Congress transferred primary authority over railroad safety from the ICC to the Department of Transportation. Thereafter, it enacted the Federal Railroad Safety Act of 1970 ("FRSA") which authorized the Secretary "to promote safety in every area of railroad operations." In addition, it expressly authorized States to adopt, or continue in effect, regulations or orders related to railroad safety until the Secretary issued an order or regulation covering the subject matter of the state requirement. The FRSA's preemption provision recognizes the States' interests in the regulation of railroad safety. *See*, CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 655(1993) (the Rail Safety Act preemption provision "displays considerable solicitude for state law"). By contrast, the ICCTA gave the STB complete regulatory power over economic affairs and non-safety operating practices of railroads. It did not intend for the STB to supplant the Secretary's nor the states' primary authority over rail safety.

49 U.S.C. §20106.

The railroad contends that the UTU complaint would require the railroad to construct a new facility, and therefore, violate the ICCTA (RR Br. 4). Section 10901 makes clear that the STB's power to authorize the "construction" of a railroad facility covers whether or not the construction is consistent with "public convenience and necessity" (*See*, 49 U.S.C. §10901©) and not to the safety standards to which the rail line's construction must conform. Similarly §10501's use of the phrase "remedies provided under this part" is demonstrated by Congress's explanation of those remedies elsewhere in the ICCTA. Those remedies (§§11701-11707; 11901-11908) do not pertain to safety and are not intended to supplant remedies specifically designed to address safety issues under federal or state law pursuant to the FRSA. To address safety issues, Congress enacted an extensive rail safety regulatory scheme in the very next subtitle of Title 49 (Subtitle V), 49 U.S.C. §§20101-21311, which is administered by the Federal Railroad Administration ("FRA"). *See*, 49 U.S.C. §201-3; 49 C.F.R. §1.49. The railroad cannot point to any language in the ICCTA's statute or legislative history which suggests that it was intended to supplant the FRA's and the states' authority over railroad safety. It is clear that the relevant statute for any preemption analysis in this case is the FRSA, not the ICCTA. Under the FRSA, there is no preemption because the Secretary has not promulgated a regulation or order covering crew locker rooms. Accordingly, the ICCTA is inapplicable and FRSA provision governs in this case.

Another principle of law applies in this case. If two statutes "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102, 133-34 (1974) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974).

B.

BOTH THE FRA AND THE STB DISAGREE WITH THE RAILROAD'S POSITION IN THIS CASE

As both the FRA and the STB recognized in a joint rulemaking:

"...both FRA and STB are vested with authority to ensure safety in the railroad industry. Each agency, however, recognizes the other agency's expertise in regulating the industry. FRA has expertise in the safety of all facets of railroad operations. Concurrently, the Board has expertise in economic regulation and assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of the railroads complement each other's interest in promoting a safe and viable industry." 63 Fed. Reg. 72,225 (Dec. 31, 1998).

Thus, both the STB and the FRA take the position that the FRSA and the ICCTA should be read in *pari materia* with the FRA (and the states as appropriate under the FRSA) retaining primary jurisdiction over railroad safety, including the issuance of safety regulations, while assisting the STB with its expertise in matters of principal concern to the STB.

The history of safety rulemaking since the passage of the ICCTA is equally indicative of how the STB and the FRA each have construed the ICCTA as not vesting preemptive jurisdiction for railroad safety regulations in the STB. In the ensuing years of its existence, the STB has not issued any railroad safety regulations, 49 C.F.R. §1001, *et seq.* By contrast, since STB has been in existence, the FRA and states continue to issue numerous railroad safety regulations, covering a broad range of safety issues.

The administrative rulings of the two affected agencies are equally instructive that the ICCTA has not vested preemptive jurisdiction for safety matters in the STB.

In Petition of Paducah & Louisville Railway, Inc. etc. FRA Docket No. FRA-1999-6138 (Jan.13, 2000), the FRA addressed the effect of the ICCTA preemption on its jurisdiction. While FRA found that the

STB had exclusive jurisdiction on the matter at issue (access to a railroad bridge), the FRA order emphasized that the ICCTA preemption was limited to "non-safety"matters:

> "Congress conferred on the STB and its predecessor (the ICC) exclusive administrative jurisdiction over the non-safety aspects of the operations of the nation's interstate rail system. Order at 5 (emphasis added).

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> "the very hallmark of rail regulation has been the exclusive nature of the administrative jurisdiction over non-safety rail operations and practices which Congress had entrusted to the Interstate Commerce Commission ("Commission") and which has been expanded and now reposes in the [Surface Transportation Board. Order at 6 (emphasis added) (citations omitted)

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> "delegation to the Commission (and now exclusively to the [Surface Transportation] Board) of all regulatory power over the economic affairs and the non-safety operating practices of railroads." Order at 6-7 (emphasis added) (citation omitted)

***

> "at the time that it was established just a few years ago, Congress made it abundantly clear that the [Surface Transportation] Board was to be its sole delegatee of power to regulate non-safety rail matters." Order at 7 (emphasis added).
>
> "The enactment of the ICCTA with its unambiguous language preempting all other federal laws which encroach on the exclusive administrative expertise of the [Surface Transportation] Board in non-safety rail regulatory matters alone is dispositive of the issue..." Order at 18 (emphasis added).
>
> "Congress's unambiguously expressed intent in 49 U.S.C. §10501(b) to centralize non-safety rail regulation as part of its efforts to facilitate uniformity in the administration of legislation designed to achieve its deregulatory goals. Clearly, in Section 10501(b), Congress bestowed exclusive administrative jurisdiction over the non-safety aspects of rail

operations on the [Surface Transportation] Board with no exceptions." Order at 19 (emphasis added).

Similarly, the STB's orders have delineated the extent of its jurisdiction to emphasize that the ICCTA did not preempt federal and state safety regulations as permitted by the FRA. In Borough of Riverdale, STB Finance Docket No. 33466 (Sept. 9, 1999), the STB stated:

> "our view [is] that not all state and local regulations that affect railroads are preempted . . . state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety. Decision at 6 (emphasis added).
>
> In Cities of Auburn and Kent WA – Stampede Pass Line (STB Finance Docket No. 33200) (July 1, 1997) the STB ruled: "[the railroad] must comply with the safety and environmental requirements imposed by other federal statutes." (Decision at footnote 7).
>
> "Not all state and local regulations that affect interstate commerce are preempted. A key element in the preemption doctrine is the notion that only 'unreasonable' burdens, i.e., those that 'conflict with' Federal regulation, 'interfere with' Federal authority, or 'unreasonably burden' interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law. Medtronic Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996)." (Decision at 6).

The STB's position in the Cities of Auburn case, involving the non-safety issue of the environmental impact of reopening a railroad line, was upheld in City of Auburn v. U.S. Government, 154 F.3d 1025 (9th Cir. 1998). This is one of the cases relied upon by the Railroad in this case. It shows the deference given to an agency's construction of its jurisdictional statute where the agency took the position that it had jurisdiction over a non-safety matter.

The Commission here should give substantial deference to the positions of the affected agencies that the ICCTA does not preempt the FRSA's scheme for railroad safety regulation. The view of the STB and the FRA that the ICCTA and the FRSA should be treated in *pari materia* is reasonable. Their construction of the ICCTA avoids the clearly unintended decimation of the nationwide system of safety regulation. Also,

the agencies' position conforms to the principles set forth in Blanchette v. Connecticut General Ins. Corp. 419 U.S. 102, 133-34 (1974), that courts should avoid assuming that statutes have been repealed by implication.

C.

THE CASES RELIED UPON BY THE RAILROAD DO NOT SUPPORT ICCTA PREEMPTION OF RAILROAD SAFETY REGULATIONS

No case law supports the conclusion that the ICCTA preempts state and federal railroad safety, or that the STB has exclusive jurisdiction on railroad safety issues.

None of the cases cited by the railroad involves the preemption of safety rules. City of Auburn v. U.S. Government, 154 F.3d 1025 (9th Cir. 1998), concerned the question of whether state environmental law were preempted when considering the reopening of a railroad line. CSX Transportation, Inc. v. Georgia Public Serv. Com'n., 944 F. Supp. 1573 (N.D. Ga. 1996) (railroad asserted that state tort claims based on excessive speed and improper warning signs are preempted under the FRSA, not the ICCTA); Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288 (D. Mont. 1997), addressed whether local regulators were preempted from ruling on the discontinuance of railroad station agencies; Friberg v. Kansas City Southern Ry. Co., 267 F. 3d 439 (5th Cir. 1998) involved a state anti-blocking a crossing statute); Burlington Northern R.R. v. Page Grain Co., 545 N.W. 2d 749, 750 (Neb. 1996) concerned the discontinuance of a service agency); and Wisconsin Central R.R. v. City of Marshfield, 160 F. Supp. 2nd 1009 (W.D. Wis. 2000) related to a condemnation proceeding.

In several of these cases a deciding factor was the deference given to the STB's position that ICCTA preemption was applicable to these non-safety issues. For example, the STB had made a ruling in the decision underlying the City of Auburn case asserting its exclusive jurisdiction. In CSX v. Georgia Public Service Commission the court emphasized that its interpretation of ICCTA preemption "is supported by the

STB's interpretation of the ICC Termination Act." 944 F. Supp. at 1583. The Anderson decision similarly cited the STB's interpretation of the ICCTA. 959 F. Supp. at 1293.

These non-safety cases are clearly distinguished from the instant case, where the STB has taken the position that ICCTA preemption does not apply. The UTU and the affected federal agencies, the STB and the FRA, all agree that the STB has been granted broad jurisdiction by the ICCTA in non-safety railroad matters. There is no authority that supports the railroad's position that ICCTA preempts a railroad safety measure.

It is curious that the railroad did not bring to the Commission's attention a significant decision regarding the ICCTA preemption, Tyrrell v. Norfolk Southern Ry. Co., 248 F. 3d 517 (6th Cir. 2001). In that case, the court discussed the preemption issues covering rail safety laws and the ICCTA. The court said: "While the STB must adhere to federal policies encouraging 'safe and suitable working conditions in the railroad industry,' the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety. 49 U.S.C. §10101(11). Rather, the agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and FRSA to be construed *in pari materia*. For example, while recognizing their joint responsibility for promoting rail safety in their 1998 Safety Integration Plan rulemaking, the FRA exercised primary authority of rail safety matters under 49 U.S.C. §20101 *et seq.*, while the STB handled economic regulation and environmental impact assessment." 248 F. 3d at 523.

Similarly, a state's preemption under the ICCTA is governed by the same principles as above, because the statute's safety authority is derived from the same safety law as the FRA's authority, i.e., the Federal Railroad Safety Act of 1970 codified at 49 U.S.C. Part 201. Accordingly, the court should find that there is no ICCTA pre-emption of the UTU claim.

V.

THE RAILWAY LABOR ACT DOES NOT PRE-EMPT JURISDICTION OF THE ICC OVR THE UTU CLAIM

CP asserts that the UTU claim should be dismissed because according to CP, the claims involve "minor disputes" which are subject to the jurisdiction of the arbitration mechanisms established by the Railway Labor Act (RLA). The claim of the UTU is that CP has failed to provide shelter facility (washroom, locker facility and lunchroom facility) convenient to the location where the UTU engineers and switchmen physically work in the West Yard. It is not disputed that the CP does currently provide washrooms and locker rooms approximately 1 ½ mile away from the West Yard where the engineers and switchmen are now required to go on and off duty. The facilities provided by CP at this time, however, are not convenient for use by the West Yard employees due to the fact they must travel the 1 ½ miles to utilize those facilities when they need to during their shift.

A.

MAJOR vs. MINOR DISPUTED UNDER THE RLA

Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202,208, 105 S.Ct. 1904, 1909, 85 L.Ed.2d 206 (1985). Pre-emption of employment standards "within the traditional police power of the State" "should not be lightly inferred." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21, 107 S.Ct. 2211, 2222, 96 L.Ed.2d 1 (1987); see also *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985) (a federal statute will be read to supersede a State's historic powers only if this is "'the clear and manifest purpose of Congress'").

Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562, 107 S.Ct. 1410, 1414, 94 L.Ed.2d 563 (1987); see also 45 U.S.C. § 151a. To realize this goal,

the RLA establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes. 45 U.S.C. § 151a. The first class, those concerning "rates of pay, rules or working conditions," *ibid.*, are deemed "major" disputes. Major disputes relate to "'the formation of collective [bargaining] agreements or efforts to secure them.'" *Conrail*, 491 U.S., at 302, 109 S.Ct., at 2480, quoting *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945). The second class of disputes , known as "minor" disputes, "grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U.S.C. § 151a. Minor disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 33, 77 S.Ct. 635, 637, 1 L.Ed.2d 622 (1957). Thus, "major disputes seek to create contractual rights, minor disputes to enforce them" *Conrail*, 491 U.S., at 302, 109 S.Ct., at 2480, citing *Burley*, 325 U.S., at 723, 65 S.Ct., at 1289.

Petitioners contend that the conflict over respondent's firing is a minor dispute. If so, it must be resolved only through the RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions. See 45 U.S.C. §184; *Buell*, 480 U.S., at 563, 107 S.Ct., at 1414; *Conrail*, 491 U.S., at 302, 109 S.Ct., at 2480. Thus, a determination that respondent's complaints constitute a minor dispute would pre-empt his state-law actions.

Case law confirms that the category of minor disputes contemplated by § 151a. of the RLA are those that are grounded in the collective bargaining agreement. The Supreme Court has defined minor disputes as those involving the interpretation or application of existing labor agreements. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 256 (1994. See *e.g., Conrail*, 491 U.S., at 305, 109 S.Ct. at 2482 ("The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]"); *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives Assn.*, 491 U.S. 490, 501, n. 4, 109 S.Ct. 2584, 2592, n. 4, 105 L.Ed.2d 415 (1989) ("Minor disputes are those involving the interpretation or application of existing contracts"); *Trainmen*, 353 U.S., at 33, 77 S.Ct., at 637 (minor disputes are

"controversies over the meaning of an existing collective bargaining agreement"); *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 243, 70 S.Ct. 577, 579, 94 L.Ed. 795 (1950) (RLA arbitral mechanism is meant to provide remedies for "adjustment of railroad-employee disputes growing out of the interpretation of existing agreements").

The Supreme Court has also held that the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA. More than 60 years ago, the Supreme Court rejected a railroad's argument that the existence of the RLA arbitration scheme pre-empted a state statute regulating the number of workers required to operate certain equipment. Missouri Pacific R. Co. v. Norwood, 283 U.S. 249 (1931).

Not long after the Supreme Court decided Norwood, it rejected a claim that the RLA pre-empted an order by the Illinois Commerce Commission requiring cabooses on all trains; the operative CBA required cabooses only on some of the trains. Terminal Railroad Assn. of St. Louis v. Trainmen, 318 U.S. 1 (1943). In that case, the Court stated:

> "State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, be the subject of a demand by work[ers] for better protection and upon refusal might, we suppose, be the subject to a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it . . . But it cannot be said that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the [RLA] was not preemption of the field of regulating working conditions themselves . . . "

Thus, under Supreme Court decisions, protections provided by state law , independent of whatever labor agreement might govern, are not pre-empted under the RLA.

As can be seen by a review of Supreme Court decisions on this subject, courts must scrutinize the operative sections of CBA and the operative sections of the state law at issue to determine if there is a pre-emption issue.

B.

THE CLAIM BY THE UTU DOES NOT INVOLVE A "MINOR DISPUTE"

The UTU claims that the engineers and switchmen who work in the West Yard require shelter facility and therefore requests one as provided for under section 1545.200 of the Illinois Administrative Code. The CP points to Article 40 of the CBA and argues that a determination of whether or not such a shelter facility must be provided would require interpretation of the provisions of the CBA and therefore it within the domain of the RLA.

Article 40 of the CBA is not difficult to read or understand. In a nutshell, it states that the CP will provide shelter facilities where workers go on and off duty (40 (a); the facilities will be constructed pursuant to State Administrative Codes (40 ©; existing facilities will be kept clean and employees are expected to help (40 (d); signs for cleanliness will be posted existing facilities (40 (e)) and in the event that conditions of existing facilities are complained of by the employees, a joint inspection will be undertaking to determine if corrections are needed (40 (f)). There is not one single word or subsection devoted to when and where facilities should be provided for employees who are assigned to work at locations other than where they go on and off duty (such as the West Yard). This is not a matter of contract interpretation, there is simply no provisions that deal with the UTU's complaint. Of course, the words "washroom", "locker room" and "lunch room" are mentioned in the CBA. However, the Supreme Court decisions dealing with RLA pre-emption teach us that the "minor dispute" determination must be rather searching. In this case, since the Formal Complaint by the UTU does not rise to a "minor dispute" for RLA analysis purposes, there is no pre-emption.

VI.

CP's MOOTNESS CLAIM IS NOT A BASIS FOR DISMISSAL OF THE UTU CLAIM

The UTU has filed a Verified Formal Complaint in this matter. The Formal Complaint states a claim under Part 1545 of the Illinois Administrative Code. The CP admits as much in its filing of its Motion to

Dismiss. As one of its basis for moving to dismiss, CP attaches an affidavit of its Manager of Facilities which states as follows:

1. My name is Deborah Balthazar. I am currently the Manager of Facilities for Canadian Pacific Railway. I have worked at Canadian Pacific Railway since April 19, 1993. I submit this Affidavit in Support of CP Rail's Motion to Dismiss.

2. CP Rail has made a number of changes in the West Yard, including ensuring that locomotives used in the West Yard have properly functioning toilet facilities, water and crew packs. In the Fall of 2004, CP Rail also installed a bungalow on the West Yard to house additional water and crew packs for employees who work in that area..

A reading of the affidavit can at most lead the reader to believe that CP will argue at hearing that the locomotives have functioning toilets. However, UTU asserts that this is not the case and often no functioning toilets are available. Likewise, the affidavit in no way defeats the claim by the UTU that its engineers and switchmen are entitled to shelter facilities that are accessible and convenient to the place where they work and that those facilities have washrooms, lockers and a lunchroom.

In addition, as the standards for motions to dismiss makes clear, a 2-615 motion to dismiss cannot be premised on an affidavit. If it is or was CP's intention to have the mootness argument treated as a 2-619 motion, it was incumbent upon CP to so indicate and also to point to the subsection of 2-619 under which it was proceedings. No having proceeded in that fashion, the mootness argument should not be accepted.

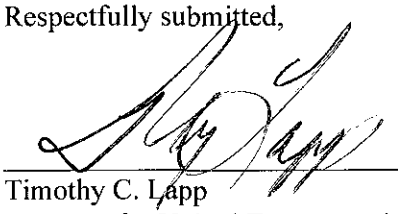
Section 1545.200 of the Illinois Administrative Code clearly provides an avenue to address these concerns. CP's motion to dismiss should be rejected and the process be allowed to hear the merits of UTU's petition so the Commission can make a determination under section 1545.200.

VII.

CONCLUSION

For all the foregoing reasons, the UTU respectfully requests that the CP's Motion to Dismiss be denied and for such other and further relief as this Court deems fair and equitable.

Respectfully submitted,



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N:\Word\TIM\UNITED TRANSPORTATION UNION\CANADIAN PACIFIC\RESPONSE TO MTN TO DISMISS

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION - ILLINOIS LEGISLATIVE BOARD	)	
vs.	)	**No. T04-0082**
CANADIAN PACIFIC RAILWAY	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE THAT on the 23rd day of February, 2005, I filed the attached RESPONSE TO MOTION TO DISMISS OF THE UNITED TRANSPORTATION UNION.

By: _____
One of Its Attorneys

Timothy C. Lapp
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PROOF OF SERVICE

I, the undersigned, an attorney, on oath state that I served this notice via federal express to the above parties at their respective addresses on February 23, 2005.

Denise Baumgartner

SUBSCRIBED and SWORN to before me this 23rd day of February, 2005.

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Notary Public

OFFICIAL SEAL
TIMOTHY LAPP
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES: 09-12-06

OFFICIAL SEAL
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES 09-12-06